

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

76-7455

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

SYNTAX TIME SHARING, LTD., and ALBERT L.
BARKSDALE, JR., individually and as agent
of SYNTAX TIME SHARING, LTD.,

Plaintiffs-Appellants,

-against-

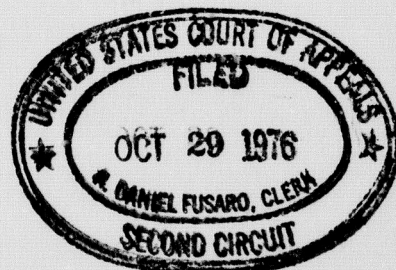
MAX SIRKUS, as CALENDAR CLERK OF THE
SUPREME COURT NEW YORK COUNTY, CHASE
MANHATTAN BANK, N.A., WILLARD COHEN,
and ROBERT BREAKSTONE, individually
and as agents of CHASE MANHATTAN BANK,
N.A.,

Defendants-Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS

JOSEPH WARDE
Attorney for Plaintiffs-Appellants
505 Park Avenue
New York, N.Y. 10022
(212) 421-2835



(5821B)

TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement	1
Issues Presented for Review	1
Statement of the Case	1
Facts	2
Argument	3
Issue 1 of Argument	3
Point I of Argument - PLAINTIFFS WERE WRONGFULLY DENIED A JURY TRIAL IN THE STATE ACTION.	3
Point II of Issue 1 - THE COURT BELOW ERRED IN RESTRICTING ITS CONSIDERATION TO THE ISSUE OF PLAINTIFFS' RIGHT TO A JURY TRIAL IN A STATE COURT.	4.
Issue 2 of Argument	5
Point I of Issue 2 - THE COURT HAS DISCRETION TO EXERCISE PENDENT JURISDICTION.	5
Conclusion	5

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<u>City of Syracuse v. Hogan</u> , 234 N.Y. 457	4
<u>Hurn v. Oursler</u> , 289 U.S. 238	5
<u>Mishler v. Mishler</u> , 31 Misc.2d 695	4
<u>Olsen v. Trust Company of Chicago</u> , 245 F.2d 522, cert. den'd 355 U.S. 896	4
<u>Siler v. Louisville & N.R. Co.</u> , 213 U.S. 175	5
<u>STATUTES</u>	
28 U.S.C.A. Sec. 2201	1
28 U.S.C.A. Sec. 2202	1
42 U.S.C.A. Sec. 1343	4
42 U.S.C.A. Sec. 1981	4
42 U.S.C.A. Sec. 1983	4
42 U.S.C.A. Sec. 1985	4
F.R.Civ.P. Sec. 12(b)(1)	2
F.R.Civ.P. Sec. 12(b)(6)	2
CPLR 601	3
CPLR 4101	3
CPLR 4102(c)	3

OTHER AUTHORITIES

	<u>Page</u>
United States Constitution	
Fifth Amendment	1
Seventh Amendment	1
Ninth Amendment	1
Thirteenth Amendment	1
Fourteenth Amendment	1

PRELIMINARY STATEMENT

This is an appeal from the order and judgment of the United States District Court for the Southern District of New York dated August 20, 1976. (I.B. Wyatt, J)

ISSUES PRESENTED FOR REVIEW

1. Whether the acts of defendants constitute or rise to the status of violations of plaintiffs' Constitutional Rights.

2. Whether the Court below should have exercised Pendent Jurisdiction therein.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action for Declaratory Relief and Damages pursuant to Title 28 U.S.C.A. Sections 2201 and 2202 for violation of plaintiffs' rights under the Fifth, Seventh, Ninth, Thirteenth and Fourteenth Amendments of the United States Constitution.

B. Course of Proceedings in the Court below.

The action was commenced by service of a summons and complaint upon defendants Chase Manhattan Bank, N.A., Willard Cohen and Max Sirkus which was complete on about July 2, 1976. (A 3,4)

Defendant Sirkus did not appear and defendant Robert Breakstone was not served herein.

Defendants Chase Manhattan Bank, N.A., and Willard Cohen interposed a motion to dismiss under Rule 12 (b) (1) and 12 (b) (6) of the Federal Rules of Civil Practice, on about July 1, 1976. (A 26) The motion was argued on August 9, 1976 and was granted by memorandum decision dated August 9, 1976, and judgment dated August 20, 1976. (A 34,35. On September 10, 1976, plaintiffs filed their notice of appeal. (A 36)

FACTS

Plaintiff, Syntax Time Sharing, Ltd., (Syntax) was a Domestic Corporation engaged in Electronic Data Processing Consulting Services inter alia, Systems Design and Analysis and Facilities Management to Banks. Plaintiff Albert L. Barksdale, Jr., (Barksdale) was a Consultant in the above areas and was an agent of Syntax.

Max Sirkus, (Sirkus) was the Calendar Clerk of the Supreme Court, New York County, engaged in the operation of the Court Calendars thereof.

Defendant Chase Manhattan Bank, N.A. was a National Association engaged in , inter alia, Electronic Data Processing Consulting Services, Systems Design and Analysis and Facilities Management to Banks.

Defendants Willard Cohen and Robert Breakstone were officers and/or employees of Chase.

Plaintiffs commenced an action against defendants Chase, Cohen and Breakstone in Supreme Court, New York County on about July 12, 1972.

On about December 4, 1973, defendants Chase, Cohen and Breakstones and/or others, issued or caused to be issued a false, defective Note of Issue and Statement of Readiness although they knew that the case was not ready for trial, for the purpose of obtaining a certain Calendar Part and Judge for the case.

Plaintiffs' motions to vacate said note and statement were decided as follows: to vacate-granted; Jury Trial-not decided. (A 22,23)

When plaintiffs' Note of Issue and Statement of Readiness was presented to the Calendar Clerk on about March 17, 1975, (A 24,24) it was wrongfully rejected and plaintiffs were denied a Jury Trial in said action.

Plaintiffs commenced the instant action against the defendants on about June 10, 1976.

ARGUMENT

1. Whether the acts of defendants constitute or rise to the status of violations of plaintiffs' Constitutional Rights.
POINT 12.

Plaintiffs were wrongfully denied a jury trial in the State Action.

The complaint in the State Action met with the requirements of CPLR 601 (Consolidation of causes of action); CPLR 4101 & 4102 (c) (Cases provided by law and causes of action' arising out of a different set of facts and circumstances)

See City of Syracuse v. Hogan 234 NY 457; Mishler v. Mishler 31 Misc 2d 695.

POINT II

The Court below erred in restricting its consideration to the issue of plaintiffs' right to a Jury Trial in a State Court.

Although there appears no right to a Jury Trial guaranteed by the Seventh Amendment to the United States' Constitution, Olsen v. Trust Company of Chicago 245 F 2d 522, the actual issue is whether all of the acts complained of by defendants constitute or rises to the status of a violation of plaintiffs' Constitutional Rights.

It appears by a parity of reasoning, that the false issuing of the Note of issue and Statement of Readiness without justification and the wrongful rejection of plaintiffs' Note of issue and Statement of readiness by defendants as alleged suggest a pattern of operation designed to deprive plaintiffs of any semblance of a Fair Trial; of the equal protection of the laws; of the privileges and immunities and of equal treatment and to discourage plaintiffs' attempt to have thier day in Court.

It appears also, that the above acts may be cognizable under Title 42 U.S.C.A. 1343, 1981, 1985 & 1983.

2. Whether the Court below should have exercised Pendent Jurisdiction therein.

Plaint I

The Court has discretion to exercise Pendent Jurisdiction

An adverse adjudication does not automatically deprive the Federal Court of its....jurisdiction. Siler v. Louisville & N R. Co 213 US 175; Hurn v. Oursler 289 US 238

It is strongly urged that this Court reverse the judgment below. In the alternative grant plaintiffs leave to amend their complaint.

CONCLUSION

The lower Court judgment should be reversed, or in the alternative, modified to grant plaintiffs leave to amend their complaint herein.

Dated: October 28, 1976

JOSEPH WARDE
Attorney for Plaintiffs
505 Park Avenue
New York, N.Y. 10022

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH REEVES, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 825 MORRISON AVE
BROOKLYN, N.Y. 10473.

That on the 29 day of OCTOBER, 1976,
deponent personally served the within BRIEF OF
PLAINTIFFS-APPELLANTS
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

1. MILBAUK TWEED HADLEY & MCCLOY
ATTORNEYS FOR DEFENDANTS-RESPONDENTS
CHASE MANHATTAN, N.A. & WILLARD COHEN
1 CHASE MANHATTAN PLAZA
NEW YORK, N.Y. 10005
2. HON. MAX SIRKUS
CALENDAR CLERK
SUPREME COURT, NEW YORK COUNTY
60 CENTRE ST.
NEW YORK, N.Y. 10007

Kenneth Reeves

Sworn to before me this

29 day of October, 1976 Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977